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No. 90-550

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE EAST ASIATIC COMPANY, INC., and
THE EAST ASIATIC COMPANY, LTD.,
Petitioners,

v.

RSR CORPORATION, QUEMETCO, INC., and
QUEMETCO REALTY, INC.,
Respondents.

On Petition for a Writ of Certiorari to the State of Washington Court of Appeals, Division One

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* ON BEHALF OF THE GOVERNMENT OF DENMARK IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37.2, the Government of Denmark hereby respectfully moves this Court for leave to file the attached brief *amicus curiae* in this case in support of issuing a Writ of Certiorari to the State of Washington Court of Appeals, Division One. Petitioners The East Asiatic Company, Ltd. and The East Asiatic Company, Inc. consented, through their attorneys, to the filing of this brief *amicus curiae*. Respondents RSR Corporation, Quemetco, Inc., and Quemetco Realty, Inc. refused to consent to such filing.

The interest of the Government of Denmark arises from its responsibility for safeguarding the rights of, and securing justice for, Danish nationals and otherwise assuring that they receive the equitable treatment to

which they are entitled in an American court under the Constitution and laws of the United States and the bilateral Treaty of Friendship, Commerce and Navigation between the United States and the Kingdom of Denmark.

The Government of Denmark has set forth in the attached brief the reasons it believes the Court should issue the Writ of Certiorari to review the constitutionality of the action of the State of Washington Court of Appeals in letting stand a jury verdict which contained on its face an illegal award of punitive damages.

Respectfully submitted,

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BRIEF *AMICUS CURIAE* ON BEHALF OF THE GOVERNMENT OF DENMARK IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

One of the primary responsibilities of the Government of Denmark is safeguarding the rights of, and securing justice for, Danish nationals, both natural and juridical, under international law, the laws of other nations, and the various treaties and other bilateral agreements to which the Kingdom of Denmark is a signatory. This responsibility also extends to protecting the interests of Danish nationals who are owners or shareholders of Danish companies operating abroad. Accordingly, the Government of Denmark has a compelling interest in assuring that its nationals receive equitable treatment from

American courts, including being accorded all of the rights to which they may be entitled under the Constitution, laws and treaties of the United States.

Additionally, the promotion of commerce between Danish nationals and the nationals of other countries, whether through international trade or investment, is a significant policy interest of the Danish government.

The encouragement of commercial relationships between nationals of Denmark and of the United States fits hand-in-glove with fostering a sense of security for the nationals of each country in their activities in the other. Both of these goals are embodied, in the case of the United States, in the treaty with the United States known as the Treaty of Friendship, Commerce and Navigation with Protocol, Oct. 1, 1951, United States-Denmark, 12 U.S.T. 908, T.I.A.S. No. 4797, 421 U.N.T.S. 105 (the "Treaty").[1]

Petitioner The East Asiatic Company, Ltd. (hereinafter referred to as "EAC") is a Danish corporation with its principal place of business in Copenhagen, Denmark.[2] It is one of Denmark's largest corporations and, at over 100 years standing, one of its oldest. It is publicly owned, with thousands of Danish stockholders, both institutional and individual. Through subsidiaries, EAC is engaged in

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[1] The Treaty is the successor to a treaty that dates to 1826, demonstrating that Denmark and the United States have long enjoyed a special relationship in commercial matters. *See* Treaty, art. XXV.

[2] EAC is a minority shareholder in Paul Bergsoe & Son, A/C, another Danish corporation ("PB&S"). PB&S is in turn the parent and sole shareholder of Bergsoe Metal Corporation, a Delaware corporation ("BMC"). It is BMC's purchase of a lead smelting facility from respondent RSR Corporation that is the subject of the action instituted against EAC in the Washington courts.

Although EAC previously held one-half of the stock of BMC through one its American subsidiaries, at the time of BMC's purchase of the lead smelting plant from RSR, neither EAC nor any of its subsidiaries had any ownership interest in BMC aside from EAC's one-third stake in PB&S.

diverse business activities throughout the world, including in the United States since at least 1907.[3] Given its twin goals of encouraging foreign trade and protecting its nationals, the Government of Denmark has a strong national interest in taking steps to assure that EAC receives all of the benefits accorded it by the Treaty, including the protection to which it is entitled under the Constitution, laws and treaties of the United States and the laws of the several States.

ARGUMENT

The central purpose of treaties of friendship, commerce and navigation (hereinafter generally referred to as "FCN Treaties") is to serve as the "medium through which two nations provide 'for the rights of each country's citizens, their property and other interests, in the territories of the other, and for the rules mutually to govern their trade and shipping.'" *Speiss v. C. Itoh & Co. (America), Inc.*, 643 F.2d 353, 356 (5th Cir. 1981), *vacated on other grounds*, 457 U.S. 1128 (1982) (quoting Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 Am. J. Comp. L. 229, 230-31 (1956)). The Treaty established the ground rules by which private-sector commerce between citizens of Denmark and the United States is regulated. *See generally*, Walker, *Modern Treaties of Friendship, Commerce and Navigation*, 42 Minn. L. Rev. 805, 806 (1958) [hereinafter cited as "*Modern Treaties*"]; Sen. Exec. Rep. No. 5, 83d Cong., 1st Sess. (1953); H. Rep. No. 1922, 82d Cong., 2d Sess. (1952). From the perspective of the Government of Denmark, the Treaty also serves to promote

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[3] Petitioner The East Asiatic Company, Inc. is a wholly owned American subsidiary of EAC which, until 1983, owned fifty percent of Bergsoe Metal Corporation. With the exception of the applicability of the Treaty, *see Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176 (1982), each of the arguments set forth herein by the Government of Denmark as *amicus curiae* applies equally to both EAC and The East Asiatic Company, Inc.

Danish investment in the United States and encourage commercial relationships between the nationals of Denmark and the United States by fostering a sense of security in Danish nationals desiring to do business in the United States.

1. The Petition for Writ of Certiorari adequately establishes the grounds for review of the Washington courts' violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution, U.S. Const. amend. XIV, cl. 1. In short, by refusing to set aside the trial court's acceptance of a verdict that contained on its face an illegal and impermissible imposition of punitive damages, the Washington Court of Appeals has deprived EAC of its property without due process just as surely as if the trial judge had let the case go to the jury without instructing the jury on the law it was to apply. *Cf. United States v. Battiste*, 24 F. Cas. 1042, 1043 (No. 14,545) (C.C.D. Mass. 1835) (Story, J.).

Arbitrary and standardless imposition of punitive damages by juries has had a chilling effect on the continuing and future commercial and business activities in the United States of nationals from many countries, including Danish nationals. This situation is exacerbated by the failure of courts, such as occurred in this case, to exercise any control or supervision over the conduct of a jury imposing such punitive damages—even when the jury's conduct in doing so is admittedly illegal and its conduct is disclosed in writing on the face of the verdict. This Court should review the decision by the Washington Court of Appeals and should fashion effective due process restraints on such arbitrary, and sometimes illegal, punitive actions of juries.

2. The Court should issue a Writ of Certiorari to review the Washington Court of Appeals decision because Federal court review can serve an important role where

an alien corporation has been subjected to litigation in the State courts.[4]

The extension of the Federal judicial power to disputes involving out-of-state or alien persons is a fundamental piece of the American Constitutional framework. *See* U.S. Const. art. III, § 2, cl. 1.[5] Not only were the Framers aware of possible "parochial state interpretations," *see Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964), and their effect on aliens, they were concerned that such prejudices would result in the unjust treatment of citizens of foreign countries. *Lumbermen's Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 54 (1954) (Frankfurter, J., concurring). *See also Burford v. Sun Oil Co.*, 319 U.S. 315, 336 (1943) (Frankfurter, J., dissenting) ("It was

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[4] Where, by virtue of the alignment of the respective parties, the alien corporation has been deprived of its right to defend the action in a Federal court—which right has been recognized as important for purposes of assuring aliens with access to the Federal judicial system—the opportunity for the parties to bring litigation before the Supreme Court is especially compelling. *See, e.g., Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964); *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419, 474 (1793) ("United States were responsible to foreign nations for the conduct of each state, relative to the laws of nations, and the performance of treaties . . . the inexpediency of referring all such questions to State Courts, and particularly to the Courts of delinquent States became apparent.").

[5] Because this provision was adopted by the Constitutional Convention unanimously and without debate, C. Wright, A. Miller & E. Cooper, 13 *Federal Practice and Procedure: Jurisdiction 2d* § 3502, p. 6 (2d ed. 1984), there continues to be some controversy surrounding the reasons for this authority to grant Federal jurisdiction. However, implicit in the grant of diversity and alienage jurisdiction was the fear that without an independent national judiciary capable of resolving disputes between citizens of different states, and between citizens and aliens, the interests of the individual States would interfere with the economic development of the nation. *See* 1 *Moore's Federal Practice* ¶ 0.71[3.-1], at 701.23 & n.11 (2d ed. 1990) (quoting Chief Justice Taft from *Possible and Needed Reforms in Administration of Justice in Federal Courts*, 8 Am. B. A. J. 601, 604 (1923)).

believed that, consciously or otherwise, the courts of a state may favor their own citizens. Bias against outsiders may become embedded in a judgment of a state court and yet not be sufficiently apparent to be made the basis of a federal claim."); [6] *Martin v. Hunter's Lessee*, 1 Wheat. 304, 347 (1816) ("state attachments, state prejudices, state jealousies, and state interests, might sometime obstruct, or control, or be supposed to obstruct or control, the regular administration of justice"). Alexander Hamilton forcefully articulated these concerns as they might affect foreign relations: "As the denial or perversion of justice by the sentences of courts, as well in any other manner, is with reason classified among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which citizens of other countries are concerned." A. Hamilton, *The Federalist*, No. 80., pp. 438-40 (Colonial Press 1901).

In the Judiciary Act of 1789, 1 Stat. 72, the First Congress addressed these concerns about parochialism by granting to the Federal courts the power to decide cases and controversies involving citizens of different States and between citizens of the United States and aliens. *See* Act of Sept. 24, 1789, § 11, 1 Stat. 73 (predecessor to 28 U.S.C. § 1332). The purpose of this grant of jurisdiction to the Federal courts was to provide out-of-state and alien litigants "access to a competent and impartial tribunal,

[6] It is possible that a "bias against" the outsider EAC is exactly what happened in this case, as is evidenced by, among other things, the fact that both the trial court and the Washington Court of Appeals failed to recognize the separate and distinct existence of EAC, The East Asiatic Company, Inc., Paul Bergsoe & Sons, A/S, and Bergsoe Metal Corporation. The result of that possible bias is, however, apparent—a verdict of more than $19,000,000.00 in compensation for a breach of warranty in a purchase of a plant for $500,000.00. The handling of the objections to a portion of that verdict is the basis for a federal claim: that the illegal award of punitive damages and the failure of the Washington Court of Appeals to set aside that verdict amount to a taking without due process of law in violation of the Fourteenth Amendment.

free from local prejudice or influence, for determination of controversies." 1 *Moore's Federal Practice* ¶ 0.71[3.-1], p. 701.20 (2d ed. 1990). *See also* Sen. Rep. No. 1830, 85th Cong., 2d Sess., to accompany House Rep. 11102, 2 U.S. Code Cong. & Admin. News 3099, 3102 (1958). Section 25 of the Judiciary Act of 1789 also vested the Supreme Court with the authority to review State court decisions in some circumstances. *See* Act of Sept. 24, 1789, § 25, 1 Stat. 85. As noted by Professor Moore, this right of appeal to the Supreme Court could protect against the same evils of State court discrimination which diversity and alienage jurisdiction sought to obviate. 1 *Moore's Federal Practice* at 701.21 n.6. *Cf. id.* at 701.25 & n.16 (diversity jurisdiction was arguably unnecessary because Constitutional protections could be provided by Supreme Court review of State court decisions).

The Treaty embodies the same concerns that parochial interests may trample on the legitimate expectations of a Danish national in the United States (or of a U.S. national in Denmark). The Treaty prescribes that nationals of either Party "be accorded, within the territories of the other Party, national treatment with respect to engaging in commercial, manufacturing, processing . . . [and other] activities." Treaty, art. VII(1). Article XXII(4) of the Treaty provides that the "national treatment" accorded under Article VII(1) to companies of the Kingdom of Denmark "shall, in any State, Territory or possession of the United States of America, be the treatment accorded therein to companies created or organized in other States, Territories and possessions of the United States of America." Treaty, art. XXII(4). The requirement to accord "national treatment" is well understood as being a prohibition on discrimination against the nationals of the other party to the Treaty. *See, e.g., Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 187-88 & n.17 (1982) ("national treatment" standard of FCN Treaties guarantees foreign companies "the right to conduct business on an equal basis without suffering discrimination based

on their alienage"); *Wickes v. Olympic Airways*, 745 F.2d 363, 366 (6th Cir. 1984) (citing Walker, *Modern Treaties, supra*, 42 Minn. L. Rev. at 811) ("national treatment" contingent standard "assures nondiscrimination or no less favorable treatment than the citizens or companies of the host country").

In a line of jurisprudence unbroken since the Constitution was adopted and implemented by the First Congress, the policy of the United States has been to recognize the inherent possibility that a citizen of a foreign state or of a foreign nation may not receive the same justice as the citizens of the forum State and it has been suggested that the Federal government will be held responsible for any such State denial of rights to an alien person.[7] Although the technicalities of diversity jurisdiction might have prevented EAC from being able to invoke the jurisdiction of the Federal courts, Supreme Court review of the judgment of the Washington Court of Appeals may correct this anomaly, as was apparently contemplated by the Framers. This Court should, therefore, vindicate the related policies of Article III, Section II, of the Constitution and the Treaty by reviewing the judgment of the Washington Court of Appeals.

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[7] Under the norms of international law, the United States is responsible for "any denial of justice by a State court, even though the Federal government has no direct authority over those tribunals." Letter of P. Moore, Asst. Sec'y for Congressional Relations, Dept. of State, to Rep. Kastenmeyer, dated Aug. 9, 1982 (quoted in Leich, *Digest of American Practice in International Law*, 77 Am. J. Int'l L. 135 (1983)).

CONCLUSION

Supreme Court review of the illegal, arbitrary and capricious conduct of the Washington State courts is necessary in order to ensure that EAC is accorded the rights to which it is entitled under both the Due Process Clause of the Fourteenth Amendment and the Treaty. The Petition for Writ of Certiorari to the Washington Court of Appeals presents substantial and compelling Constitutional questions worthy of this Court's consideration. The Government of Denmark respectfully submits that this Court should review the decision of the Washington Court of Appeals and that the absence of such review could be detrimental to the national interests of both the United States and the Kingdom of Denmark.

Respectfully submitted,

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